No. 2[redacted]40

IN THE

United States
Supreme Court

OCTOBER TERM, 1925
(30,835)

JAMES-DICKINSON FARM MORTGAGE CO. and A. D. DICKINSON,

Plaintiffs in Error

vs.

CARRIE M. HARRY,

Defendant in Error.

ERROR TO DISTRICT COURT,
EASTERN DISTRICT OF ILLINOIS

GEO. W. ENGLISH, *Judge.*

REPLY BRIEF

GEORGE F. REABICK,
Attorney for Plaintiffs in Error.

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No. 259

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REPLY BRIEF

BRIEF OF ARGUMENT.

MAY IT PLEASE THE COURT:

In this reply we take up the points argued in the same order as has been followed by Opposing Counsel.

I.

VALIDITY OF SERVICE ON CORPORATE DEFENDANT

Our demurrer to plaintiffs' reply to our plea to the jurisdiction, admitted nothing beyond the facts pleaded.

To confer jurisdiction by the service in question, something further was needed than the mere presence of the officer within the state, and further than the transaction of some item of business.

The decisions of this Court are positive that something further is required, viz: that the corporation is, within the meaning of the law, "doing business."

The Rosenberg case we cited to you, 260 U. S. 516, contains every element of fact averred by this plaintiff in the replication in question, and yet this court say that any issue thus joined was "*of no legal significance.*"

Our demurrer to the plaintiff's replication pointed out specially that such replication "does not fully answer the said plea in abatement nor the matters therein set forth." R. 20.

> "And particularly for special cause of demurrer, defendant points out that the allegations in said plea in abatement that defendant at the times mentioned in the process and return herein was not engaged in or carrying on business in the State of Illinois, are not traversed.
>
> Nor are such allegations met in said replication by any matter by way of confession and avoidance, nor are the same otherwise replied to."

If there are any authorities which may seem to indicate that we conferred jurisdiction upon the court by pleading to the merits after the demurrer was overruled—they could not possibly prevail against the authority of *Southern Pacific Co. v. Denton*, 146 U. S. 202.

II.

STATUTE OF LIMITATIONS

There are two defendants in this case. One an individual, the other a Missouri Corporation.

Manifestly absence from the State could not be relied upon to toll the Statute as to the individual defendant for he was at all the times in question an actual resident of the State of Texas, R. 83.

As to the corporate defendant, the record shows, as we pointed out at page 36 of our brief, that it was at all times in question subject to process in the State of Texas, R. 83, and under the Statute of that State, as construed by its courts, the running of the Statute was not stayed.

Counsel for defendant in error on page 14 of the brief, quote Wood on Limitations, *Rathburn v. Northern Central R. R.*, 50 N. Y. 656, and *Winnie v. Sandwich Mfg. Co.*, 86 Iowa 608, as supporting the proposition that a foreign corporation cannot plead the Statute of Limitations.

If these authorities so hold, they are not in accordance with the weight of authority.

The rule as given by the author of Corpus Juris, Vol. 37, Limitation of Actions, Sec. 395, page 1000 is as follows:

> "But the predominating judicial opinion is that a corporation, although created by the laws of another state, should be deemed to be present in the state of the forum if it is there for the purpose of its business in compliance with the laws of the state in that behalf, so that it is subject to the process of the state; that such a presence will avail the foreign corporation under a plea of limitations and a want of such presence will deprive it of this advantage under the saving clause as to absence or non-residence."

We will not cite the mass of authority there quoted. It is sufficient here to say that the cases support the rule. Where the corporation is amenable to process, the Corporation is not absent from the State within the exceptions claimed.

That the cases cited by opposing counsel are against the weight of authority may be also seen from an examination of the cases cited by *Fletcher on Corporations*, Vol. 9, Sec. 6017, page 10266.

Under the undisputed evidence, there never was a day after the cause of action arose, when suit might not have been instituted and process served upon either defendant in the State of Texas. Therefore, non-residence is unavailing as an answer to our plea.

III.

CONSTITUTIONALITY

The real, vital, fundamental question in this case arises under this head.

We insist most earnestly that this enactment is fatally defective.

The cases which are cited on Page 20 et seq. of the brief of Counsel for defendant in error, do not apply as we see it.

The vice in this Statute and as it was applied in this case, is that it purports to found a liability on the fact that the man or corporate body sued, has received a financial benefit out of a transaction tainted with fraud, without any reference to any further participation.

We analyzed the Statute on page 44 of our brief, and its full text is set forth on page 42 of that brief. We will not repeat here. The general principles of law announced by Opposing Counsel under subdivisions (a) and (b) cannot be denied, but this Statute does more than simply to state what constitutes prima facie proof, or to change the common law, or to add a remedy to an existing right.

The Statute might be attacked insofar as it purports to say what is prima facie proof of fraud, because there is no logical connection between the act proven and the conclusion to be drawn. We doubt whether the Legislature can say that it is to be inferred that the statement when it pertains to something to be done in the future, was "falsely and fraudulently made,"—if not complied with "within

a reasonable time," and that the only defense open to a defendant in such a case is that he "was prevented from complying therewith by the Act of God, the public enemy or some equitable reason." R. 42.

Counsel for defendant in error seek to bolster up the radical provisions found in Sec. 3 by asserting that the real meaning of the Statute is to create liability only where two things concur, viz: 1. "Making the false representations," and 2, "deriving the benefit of said fraud." R. 42.

Such a construction ignores the repetition of the words "and all persons," in the second line. It also ignores the force of the words creating "joint liability." If the purport of the Statute is simply to apply to one class of persons, viz: those who are guilty both of making false representations and profiting thereby, there is no occasion to make any reference to a joint liability.

Furthermore, there would be no occasion for the Legislature to add anything to the persons "making the false representations." If it was intended to create such a liability, mere participation in making the representation was sufficient. It was superfluous to couple the defendant with having received financial benefit.

To say that liability was intended to rest only in a case where there is participation both in the making of the fraudulent statements, and also in receiving a portion of the proceeds, is a strained and unreasonable construction, and not in accordance with the ordinary meaning of the words employed.

Clearly the Statute was intended primarily to create a liability for punitive or exemplary damages, over and

above such liability as is created in the prior sections of the Statute. Sec. 4, R. 42.

It was intended also to create a liability over the above that which would arise from the making of the false statements against "all persons deriving the benefit of said fraud." R. 42.

And it purports also to declare that a liability can be based upon a "false promise," as well as upon a statement pertaining to a present or past existing fact, and to place the burden on the defendant of proving his good faith, and denying to him every defense unless he can prove that the Act of God, the public enemy, or some equitable reason prevented performance. R. 42.

We repeat as stated in our original brief "It undertakes to create a vicarious liability unknown to our laws and repugnant to every sense of justice, and in violation of all hitherto accepted legal obligations and principles." Page 47.

It is equally obvious, we believe, that the Statute violates not only the XIVth Amendment, but also Article III, Sec. 1, which vests judicial power in the Federal Courts, and that no Legislature of Texas can prescribe a measure of damages or a method of procedure for a United States District Court, sitting in Illinois.

We respectfully again refer you to the authorities and principles set forth on Page 51 of our brief.

IV.

LIABILITY OF DEFENDANTS FOR REPRESENTATIONS MADE BY OTHER PERSONS

What was said to the plaintiff concerning the land in question when she was about to buy it, was not said by either defendant.

The contract was made with a third party, a corporation, styled the Lone Star Immigration Co. R. 64.

It is sought to connect these defendants with such statements on the doctrine of the existence of a conspiracy to defraud.

This the proof completely fails to sustain.

The only evidence pointed out, and all that can be pointed out is that there was an inter-relation of three corporations, viz: the Lone Star Immigration Co., a James-Dickinson Farm Mortgage Co., a Texas Corporation, and a James-Dickinson Farm Mortgage Co., a Missouri Cororation, (the Corporation defendant here sued). Record 63. And that in these three corporations Dickinson, the individual defendant and a man named James, owned the controlling stock.

We submit that the law does not presume any fraudulent purpose in creating the several corporations. Nor were the jury justified in drawing such conclusion therefrom.

In these days it is a matter of very common knowledge that we have holding corporations, selling corporations, and

the like, all of which are perfectly legitimate, and each of which is recognized as a separate legal entity.

The only connection of this corporate defendant with the transactions here in question is that it loaned money to the Texas Corporation, and after land was sold it was reimbursed. R. 63.

The only connection of Dickinson, the individual defendant is that he was an officer and stock-holder in each of the three corporations, and if they made a profit, some of the proceeds of the sale in question would come to him.

There is no pretense whatever that he had any knowledge of the statements made to this plaintiff, which induced the purchase in question, or that with knowledge he ever ratified the same.

In view of this state of the record, no allegation of conspiracy could help the plaintiff. At the close of plaintiffs case, each defendant moved for a directed verdict. R. 71, and renewed the motion at the close of the whole case. R. 95.

This presented a question of law, which is reviewable in this Court.

V.

ENFORCEMENT OF TEXAS STATUTE IN A FEDERAL COURT IN ILLINOIS

The authorities cited by counsel do not in any way meet the propositions we pointed out in our brief at page 63, et seq.

Counsel misapprehend the scope of this Statute. It is not merely remedial in its nature, and its purpose is not simply to give an additional remedy for the violation of a right which already existed under the common law, but it goes further and undertakes to create a liability entirely unknown to the common law, and entirely opposed to every fundamental principle of that law, viz: to give a right of action to a plaintiff who has been deceived into buying land in Texas, against every man into whose hands any portion of the purchase money can be traced.

We will not here repeat what we have said under the heading of Constitutionality at page 5 of this reply, and at page 39 of our original brief.

We feel that there is a very grave doubt as to the right of any court outside of the State of Texas to enforce the strange liability which this Statute professes to create. However, if the Statute is unconstitutional, as we confidently believe, then this question disappears.

VI.

CHARGES TO THE JURY

Counsel for defendant in error seem to have no answer to the argument which we set forth on page of our brief under this head. No effort whatever is made to justify the actions on the trial court.

On page 28 of their brief, they simply rely on a rule requiring the exceptions to be taken before the Jury retire.

That does not fully meet the case.

What occurred before the Jury retired is shown on page 102 of the printed record.

Counsel for plaintiff did then and there call attention of the Court to at least two matters, viz: that the burden of proof at all times rested on plaintiff, and that the rule of damages under the statutory count, and the common law count were not the same.

We call your special notice to the fact that we in apt time did offer to call attention of the Court to several matters, and we were met with this statement:

"*You tell the Reporter what you except to* and he gets it, *needn't call my attention to anything.*" R. 102.

A little later we were advised:

"If you have these suggestions prepared you can file them as you suggest and then except to my refusal to give them or embody them in the charge." R. 102.

The authorities cited by defendant in error show that the purpose of the rule is to afford the trial judge an opportunity to re-consider or explain any matter contained in his charge, after attention is called thereto.

In one of the cases cited the exceptions were not designated until the next day.

In another of the cases it is indicated that the matters complained of may be reduced to form at a later time.

If this Court feels that notwithstanding the explicit order of the trial court, that he wanted us to call nothing to his attention, it was incumbent upon us to disobey him, we

submit that his action ought to be noticed, and we ought to have relief under that other rule, which requires this Court to take cognizance of a plain error though unassigned.

This court will note that we did call specific attention to the charge on the subject of *the measure of damages* before the Jury retired. R. 102.

This case went to the Jury upon a declaration containing two counts.

The first was a common law issue. The measure of damages in that event is defined by *Sigafus v. Porter*, 179 U. S. 116, 45 L. Ed. 113. No instruction covered this issue.

The second count was based on the Texas Statute, and if its validity could be assumed, we submit that no Statute of Texas can lawfully fix the measure of damages to be assessed by a Federal Court, sitting in the State of Illinois. If the Texas Statute is invalid as we elsewhere claim, then as a matter of course there was error in the charge to the jury on the measure of damages.

VII.

CONCLUSIONS

The defendant in error makes no attempt to justify the actions of the trial judge in admitting evidence. It needs but a reference to the record to see the vicious character of this procedure. (Page 78 of our brief and pages of the record there referred to).

Again our motions for a directed verdict presented a question of law, and we earnestly insist that it was reversible error not to direct such a verdict.

Opposing Counsel seem to think that this court passes merely on the questions of jurisdiction and constitutionality.

As we understand it, the entire record is open, and this Court passes on every question involved, and we believe that we are entitled to a final judgment here, in bar, and for costs, and thus we will ever pray.

Respectfully,

G. F. Rearick. GEORGE F. REARICK,
Attorney for Plaintiffs in Error.

No. 40

IN THE

United States
SUPREME COURT

OCTOBER TERM, 1927.

(30,455)

JAMES-DICKINSON FARM MORTGAGE CO.
and A. D. DICKINSON,

Plaintiffs in Error,

vs.

CAREY M. HARRIS,

Defendant in Error.

IN ERROR TO THE DISTRICT COURT OF
LAFAYETTE COUNTY, FLORIDA.

OPINION.

The full text of the opinion of the Court, delivered by MR. JUSTICE BRANDEIS, follows:

This action was commenced in an Illinois Court by Mrs. Harry, a citizen of that State, against Dickinson, a citizen of Texas, and James-Dickinson Farm Mortgage Company, a Missouri corporation. The defendants removed the case to the Federal Court on the ground of diversity of citizenship.

Dickinson, who had been served personally within Illinois, pleaded to the merits. The company, upon whom service had been made by reading and delivering the summons to Dickinson, "as its president," while he was temporarily in Illinois, challenged the jurisdiction of the court over it. This objection was overruled; and it also filed pleas to the merits.

The case was then tried, as against both defendants, before a jury; the plaintiff got a verdict; and judgment was entered thereon, because of a claim that rights guaranteed by the Fourteenth Amendment had been denied them, a direct writ of error was allowed under section 238 of the Judicial Code, before the amendment of February 13, 1925.

The action is in tort to recover damages resulting from false representations by which the plaintiff was induced to purchase while in Texas a tract of land located there. The declaration contains two counts, the first based on the common law liability, the second on a statute of that State.

(OPINION)

Act of March 11, Compl. Stat. Tex. 1920, Title 62, Articles 397,) a, b, c, d, 639.

Dickinson was vice president and treasurer of the defendant corporation and also of two other allied corporations. He, together with James, the president of the corporation, owned 90 per cent of their stock. It was charged that these corporations were the instruments through which the fraudulent scheme was carried out.

The device employed in effecting the sale was the taking of the plaintiff and other alleged victims from the North in midwinter by a special Pullman from Kansas City to Brownsville, near which the land lies, and securing signatures from all on the spot. There was evidence to show that the people in charge of the party made materially false statements concerning the quality of the land sold.

Dickinson did not then talk personally with the plaintiff. But he was present on the occasion; heard the false statements then made; took direct part in sales then made; and later personally induced the plaintiff to anticipate the payment on notes given as part of the purchase price.

In the course of the trial a multitude of requests for rulings made by the defendants were denied. Many other rulings to which they objected were given. Exceptions were duly taken. As the case is properly here on constitutional grounds, the jurisdiction of this Court extends to a review of all questions. Chaloner v. Sherman, 242 U. S. 445, 457. All have been considered. Only a few require discussion.

First. The objection to the jurisdiction over the corporation was taken by a plea in abatement. The decision thereon was made upon a demurrer to the replication. By

these pleadings it was admitted that the residence and principal place of business of the corporation was in Missouri; that it had never been a resident of Illinois; that Dickinson, its president, was in Illinois on business of the corporation at the time of the service; but that it had not engaged in, or carried on, business within the State.

Jurisdiction over a corporation of one State cannot be acquired in another state or district in which it has no place of business and is not found, merely by serving process upon an executive officer temporarily therein, even if he is there on business of the Company.

Philadelphia & Reading Ry. Co. v. McKibbin,
243 U. S. 264;

Rosenberg Bros. v. Curtis Brown Co.,
260 U. S. 516;

Bank of America v. Whitney Central National Bank,
261 U. S. 171;

Lumiere v. Wilder,
261 U. S. 174, 177.

The objection to the jurisdiction over the corporation should have been sustained. As it was not waived by the later proceeding in the case, the judgment against this defendant is reversed with directions to dismiss the action as to it. This reversal does not require that the judgment be reversed also as to Dickinson.

Compare *Camp v. Gress*,
250 U. S. 308, 317.

(OPINION)

Second. It is contended, on several grounds, that the statute violates the due process clause. One ground is that the statute includes among the persons jointly and severally liable for the actual damages "all persons deriving the benefit of said fraud". This provision is said to be unconstitutional.

The argument is that thereby the State undertakes to fix a liability for damages regardless of participation in the wrong, so that where a corporation has received the money arising from a faudulent sale, every stockholder becomes liable for the tort; and that by making the liability joint and several, the statute makes one person liable for the wrong of another, although there was neither participation in nor ratification of it, nor even knowledge.

At common law every member of a partnership is subject to such a liability.

Strang v. Bradner,
114 U. S. 555;

McIntyre v. Kavanaugh,
242 U. S. 138, 139;

and often stockholders of corporations are made similarly liable by statute. Compare

Thomas v. Matthiesen,
232 U. S. 221, 235;

Buttner v. Adams,
236, Fed. 105.

The case presented by the pleadings and the evidence, so far as Dickinson is concerned, is, however, a very differ-

ent one from that suggested. He is not sued as stockholder; and the count on the Texas statute does not charge him with full liability for the loss suffered, because as stockholder he received some benefit. It charges specifically that "the defendants, and each of them, derived the benefit of the fraud and deceit". And their liability is sought to be enforced primarily because "they represented themselves to the plaintiff to be the owners" of the large tract of land; and cheated her "through their authorized agents".

If Dickinson, either personally or through agents, made knowingly false statements with intent that the plaintiff should act upon them, his liability, either at common law or under the statute, would not depend upon the receipt of any benefit by him. See

Nevada Bank v. Portland Nat. Bank,
59 Fed. 338;

Hindman v. First Nat. Bank,
112 Fed. 931, 944-945;

Goldsmith v. Koopman,
140 Fed. 616, 621;

Talcott v. Friend,
179 Fed. 676, 680.

There was in the evidence ample support for a finding of such deception.

Another contention is that the statute violates the due process clause in providing that actionable fraud shall exist not only when there is "a false representation of a past or existing material fact," but also if there is a "false promise

to do some act in the future which is made as a material inducement to another party to enter into a contract and but for which promise said party would not have entered into said contract, ... "

The contention is groundless. To modify the substantive and procedural law so that recovery may be had in tort for a breach of contract, is well within the power of a State. An action for deceit was long the sole remedy for a breach of warranty, and it still lies in some jurisdictions. See

F. L. Grant Shoe Co. v. Laid,
212 U. S. 445, 449;

Nash v. Minn. Ins. & Trust Co.,
163 Mass. 574, 587;

Carter v. Glass,
44 Mich. 154.

Recovery in contract on a tort that is waived is common. See

Crawford v. Burke,
195 U. S. 176, 194.

Here, moreover, no such change is brought about by the statute. Some courts have long recognized that a false promise is a species of false representation for which there is remedy in tort,

Church v. Swetland,
243 Fed. 289, 294-295;

Wright v. Barnard,
248 Fed. 756, 775;

as, for instance, where goods are obtained on credit by a purchaser who does not intend to pay for them. See

Burrill v. Stevens,
73 Me. 395;

Steward v. Emerson,
52 N. H. 301.

It is also contended that the statute violates the due process clause by providing that whenever a promise thus made has not been complied with by the party making it within a reasonable time, "it shall be presumed that it was falsely and fraudulently made, and the burden shall be on the party making it to show that it was made in good faith but was prevented from complying therewith by the Act of God, the public enemy or by some equitable reason."

This contention also is groundless. It is well settled that a State may consider proof of one fact presumptive evidence of another, if there is a rational connection between them,

Hawes v. Georgia,
258 U. S. 1, 4,

and also that it may change the burden of proof,

Minn. & St. L. R. R. Co. v. Minnesota,
193 U. S. 53.

Moreover, the lower court gave no charge based upon this provision of the statute. And it is at least doubtful

whether this provision should be construed as applying to actions brought outside Texas. (See

Pritchard v. Norton,
106 U. S. 124, 129-136;

Richmond & D. R. R. Co. v. Mitchell,
92 Ga. 77;

Chicago T. T. R. R. Co. v. Vandenberg,
164 Ind. 470;

Jones v. C. St. P. M. & O. Ry. Co.,
80 Minn. 488, 490-491;

Pennsylvania Co. v. McCann,
54 Ohio St. 10, 17-18.

Compare

Hoadley v. Northern Transp. Co.,
115 Mass. 304;

But see

Hartmann v. Louisville & N. Ry. Co.,
39 Mo. App. 88, 98-101.)

Third. It is claimed that the Texas statute violates the equal protection clause in that it applies only to fraud in transactions involving the purchase of real estate or of stock in a corporation or joint stock company.

The contention is clearly unfounded. A statute does

not violate the equal protection clause merely because it is not all-embracing.

Zucht v. King.
260 U. S. 174, 177.

A State may direct its legislation against what it deems an existing evil, without covering the whole field of possible abuses.

Farmers & Merchants Bank v. Federal Reserve Bank,

262 U. S. 649, 661.

The occasion of the legislation is indicated by the urgency provision of the statute which recites "that there are now in this state a number of fraudulent land schemes and that a great number of citizens of this State have been defrauded thereby."

Fourth. It is urged that a Federal Court for Illinois should not enforce the liability under the Texas Statute, because Illinois has not enacted a statute of similar import. The general rule is that one State will enforce a cause of action arising under laws of another; that a Federal Court of any district will enforce a cause of action arising under the law of any State; but that ordinarily the courts of one government will not enforce the penal laws of another.

The argument is that the Texas statute is a penal law, because it provided: "All persons knowingly and wilfully making such false representations or promises or knowingly taking advantage of said fraud shall be liable in exemplary damages to the person defrauded in such amount

as shall be assessed by the jury not to exceed double the amount of the actual damages suffered."

Exemplary damages are recoverable at common law in many States. A statute providing for their recovery by and for injured party is not a penal law.

Huntington v. Attrill,
146 U. S. 657, 666-683.

Compare

Atchison T. & S. F. Ry. v. Nichols,
264 U. S. 348, 350-351.

No reason appears why the cause of action arising under the Texas statute should not be enforced in Illinois. The Texas statute as applied in this case does not add any extraordinary feature to the common law liability for fraudulent representations. There is nothing in the public policy of Illinois with which the statutory cause of action is inconsistent.

It is not shown that substantial justice between the parties cannot be done consistently with the forms of procedure and the practice of the Federal courts for Illinois.

Reversed as to James-Dickinson Farm Mortgage Co.

Affirmed as to A. D. Dickinson.

January 10, 1927.

PETITION.

MAY IT PLEASE THE COURT:

The Plaintiff in Error, A. D. Dickinson, now comes, and by his counsel moves the Court to grant a rehearing in this cause, in which an opinion was handed down on January 10, 1927.

He respectfully submits that the judgment affirming damages against him individually, is erroneous, and as he verily believes is based upon a misconception of the record, and of the legal conclusions to be drawn from the evidence.

A copy of the opinion filed by this Court is prefixed to this petition.

The points to which attention is called in this petition and the grounds relied upon are as follows:

1. The Court has misapprehended the participation of defendant Dickinson in the transaction in question.

2. There is no evidence in the record to support the necessary prerequisites demanded by this Statute to create a personal liability, for punitive damages.

3. Under the construction placed by the Texas Courts upon this Statute, no personal liability exists.

4. Under the pleadings and evidence the Statute of Limitations is a bar.

5. The rulings on admissibility of evidence were prejudicial.

I.

The Court says on page 2:

"Dickinson did not then talk personally with the plaintiff. *But he was present on the occasion; heard the false statements then made; took direct part in sales then made;* and later personally induced the plaintiff to anticipate the payment on notes given as part of the purchase price."

(The italics are ours.)

As to his presence, his hearing the false statements, and as to his taking any part in the sales in question, the evidence is directly to the contrary.

We made this statement on page 67 of the brief filed for Plaintiffs in Error, and it is absolutely sustained by the record. (Testimony of Mrs. Harry, R. 39).

II.

Liability under the Texas Statute is first for *actual* damages, and secondly for *exemplary* damages.

The verdict is for $7,000 (R. 109). The actual damages do not exceed $6,000. Therefore the case against Dickinson must rest on a right of action for exemplary damages as created by the Texas Statute.

Such exemplary damages apply only in the following cases:

a. Where the person *knowingly* and *wilfully* makes the false representations.

b. When he *knowingly* takes advantage of the fraud.

Texas Stat. our brief page 42, R page 12.

Here again we respectfully suggest that this Court has not correctly interpreted the record. It is said on page 5:

> "If Dickinson either personally or through agents, made knowingly false statements with intent that the plaintiff should act upon them, his liability, either at common law or under the Statute, would not depend upon the receipt of any benefit by him" (citing authorities). "There was in the evidence ample support for a finding of such deception."

This assumes the personal participation of Dickinson in the making of the alleged false statements, whereas in fact, not a scintilla of evidence connects him therewith.

There is no evidence that he either:

a. Knowingly and wilfully made the false representations in question, or that,

b. He knowingly took advantage of the fraud.

Doing or omitting to do a thing "knowingly and wilfully" implies not only a knowledge of the thing but a determination with a bad intent to do it or omit doing it.

Felton v. U. S.,
6 Otto. 702.

III.

If the Statute, as the opinion holds, in no way violates the terms of the Federal Constitution, then this suit is one to enforce a liability created by the duly constituted authorities of the State of Texas, and the decisions of the Courts of that State are binding upon this Court. On page 55 of our brief your attention is directed to El Jardin Immigration Co. v. Karlan, Tex. Civ. App., 245 S. W. 1043, and same case also reported in 247 S. W. 671 and 277 S. W. 173.

The result of that litigation is, (and the facts are as nearly parallel as may ordinarily be found to exist), that there is no personal liability, in the absence of participating in the making of the representation (and the Statute in so many words requires that this be *knowingly* and *wilfully* done), or in taking advantage of the fraud, (and the statute in so many words requires that this be *knowingly* done).

Where it must be found, as here, that the only possible ground to hold a defendant is participation through an *agent*, the Statute has no application, save where the proof shows knowledge.

In other words *wilfully* and *knowingly* are essential ingredients to a right of recovery for punitive damages.

IV.

Again all right of recovery is barred by the lapse of two years' time, before instituting the suit, unless plaintiff

has excused herself, first by her pleadings and secondly by her proofs.

The special plea of this defendant sets forth the Statute, and the lapse of time. (R. 16).

The replications are both by way of confession and avoidance.

In one pleading she avers an exception in the Statute as against non-residents, and that Dickinson during the whole time lived outside of Texas. (R. 27).

The evidence is undisputed that he at all times lived within the State of Texas. (R. 83).

Therefore this excuse fails.

In another pleading she avers that she was ignorant of the falsity of the representations and did not learn the truth until within 2 years before suit was begun. (R. 19).

An averment of ignorance does not satisfy the law which requires diligence to ascertain the truth.

Non-discovery, standing alone, is not an exception to the running of the Statute. And proof without averment in the pleading is ineffectual.

V.

This defendant also feels that he has not had the kind of a trial the law entitles him to have. The whole case was bottomed on a liability under this Statute, which we earnestly maintain, is unfounded, and we were constantly confronted with rulings by the Court, on the admission of evi-

dence, which could not do otherwise than prejudice the jury. (Brief pages 78 to 83).

We therefore ask your patient re-consideration of the questions involved, which were pointed out by the brief we filed.

The Court was probably moved to hold that the judgment should be affirmed as to Dickinson, by concluding that he stood by when the so-called agents were puffing up the land, and its value and productivity and that he took part in closing the contract, and had actual knowledge of what transpired under the version given by plaintiff's witnesses. The record presents no such case.

There was a motion by Dickinson for a directed verdict. (R. 71 and 95), and this searches the record. In the absence of proof of facts creating liability the trial court erred in not granting the motion.

We most earnestly insist that the case was tried solely on the theory that this Texas Statute gave a right of recovery for exemplary damages; and we believe that this theory is not correct under the law and the evidence, and that he was prejudiced by the rulings on questions of evidence, and therefore the judgment should be reversed as

to him, as well as the corporation, either absolutely, or for a new trial.

Respectfully submitted,

G. L. Reavis.

Counsel for Plaintiff in Error.

A. D. DICKINSON.

I, the undersigned, counsel for A. D. Dickinson, one of the Plaintiffs in Error, do hereby certify that this petition is presented in good faith, and not for delay.

G. L. Reavis.

Apr 19 1926

(19)

WM. R. STANSBURY
CLERK

No. [redacted] 40

IN THE

UNITED STATES
SUPREME COURT

October Term, A. D. 1925.

(30635)

JAMES-DICKINSON FARM MORTGAGE COMPANY and A. D. DICKINSON,
Plaintiffs-in-Error,
vs.
CARRIE M. HARRY,
Defendant-in-Error.

Error to the District Court of the United States for the Eastern District of Illinois.

GEORGE W. ENGLISH, *Judge.*

MOTION OF DEFENDANT-IN-ERROR TO DISMISS.

WILLIAM M. AGNEW,
Attorney for Defendant-in-Error.

WALKER T. GUNN,
Of Counsel.

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No. 259

IN THE

UNITED STATES
SUPREME COURT

October Term, A. D. 1925.

(30835)

JAMES-DICKINSON FARM MORTGAGE COMPANY and A. D. DICKINSON,
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vs.
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Error to the District Court of the United States for the Eastern District of Illinois.

GEORGE W. ENGLISH, *Judge.*

MOTION OF DEFENDANT-IN-ERROR TO DISMISS.

And now comes defendant-in-error, Carrie M. Harry, and moves the Court to dismiss the Writ of Error filed herein, and for cause shows:

1. The Judge of the District Court of the United States for the Eastern District of Illinois did not certify

the question of jurisdiction for decision by the Supreme Court.

2. It does not appear from the transcript of record that the question of jurisdiction of the District Court of the United States for the Eastern District of Illinois, over the defendant, James-Dickinson Farm Mortgage Company, was the sole question of issue determined by the trial court.

3. It does not appear from the transcript of record that the question of the jurisdiction of the District Court of the United States for the Eastern District of Illinois, over the defendant, James-Dickinson Farm Mortgage Company, was the single question in issue.

4. It appears from the record that the question of jurisdiction over the corporate defendant, James-Dickinson Farm Mortgage Company, is raised only in Assignment of Error Number 26, and that there are thirty-four (34) other Assignments of Error based on other grounds, and that said transcript of record contains no certificate certifying only the question of jurisdiction of the District Court of the United States for the Eastern District of Illinois to this Court.

5. It appears from the transcript of record and Assignments of Error that Plaintiff-in-Error attempt to question both the jurisdiction of the District Court over the corporate defendant, James-Dickinson Farm Mortgage Company, and also the merits of the whole case.

6. The record and Assignments of Error do not show any substantial constitutional question under the Constitution of the United States involved in the case.

7. All constitutional questions raised by the Assign-

ments of Error have been previously decided by this Court; hence, the question raised is frivolous.

8. It has been decided that similar statutes do not violate the Fourteenth Amendment to the Constitution of the United States in depriving the defendants of property without due process of law.

9. It has been held that similar statutes do not violate Section 1, Article 3, of the Constitution of the United States, conferring judicial power upon the United States Courts.

10. It has been decided by the Supreme Court that similar statutes do not violate the Constitution of the United States in depriving the defendants of the equal protection of the laws.

11. It has been held by the Supreme Court of the United States that statutes changing the burden of proof or placing the burden of proof upon the defendant, do not violate the provision of the Constitution of the United States guaranteeing to the defendant due process of law and the equal protection of the laws.

12. All of said propositions having been decided by the Supreme Court of the United States, no Federal question is presented.

13. The Plaintiffs-in-Error by their Assignments of Error question the verdict and judgment upon its merit, which said question should be taken to the Circuit Court of Appeals for the Seventh Circuit, instead of to the Supreme Court.

FOR ALL OF WHICH SAID REASONS Defendant-

in-Error prays that the Writ of Error in this case be dismissed.

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Attorneys for Defendant-in-Error.

STATEMENT.

The original action was one of fraud and deceit, and conspiracy to defraud, commenced in the Circuit Court of Vermilion County, Illinois. It was removed upon the ground of diversity of citizenship to the District Court of the United States for the Eastern District of Illinois. The defendant, A. D. Dickinson, was personally served with process in Vermilion County, Illinois, and the defendant, James-Dickinson Farm Mortgage Company, was served with process at the same time, by delivering same to A. D. Dickinson as President of the Company. A plea in abatement to the jurisdiction of the corporate defendant was filed. To this plea a replication in the way of traverse was had, demurred by the defendant to the replication, which was overruled, and judgment to the writ quashed. The defendant, A. D. Dickinson, pled to the merits, as did also the corporate defendant, after the overruling of this demurrer.

The case was tried upon its merits before a jury, and verdict of judgment in favor of the plaintiff.

It was attempted to appeal this cause direct to the Supreme Court upon the grounds that the jurisdiction of the District Court was involved, and also certain constitu-

tional questions under the Constitution of the United States.

There is no direct Assignment of Error raising the jurisdictional question, except the first and second Assignments of Error, which are general in their nature, that the Court erred in not sustaining the motion to direct a verdict for the defendant, and that the judgment of the Court is contrary to law. The Assignments affecting the constitutional question are the fifth, fourteenth, fifteenth, sixteenth and seventeenth.

The Statute of Texas in question, briefly, was one defining actionable fraud with regard to transactions in real estate, and providing that if a promise is not complied with within a reasonable time it is presumptively fraudulent, and making all persons guilty of the fraud and persons deriving benefit from the fraud liable for the actual damages, and persons wilfully and knowingly making false representations liable in exemplary damages not to exceed double the amount suffered. The Act further provided that actual damages should consist of the difference in the value as represented and its actual value (Transcript 12).

The fifth Assignment of Error claims that the Texas statute deprived the defendant of property without due process of law.

The fourteenth, that said statute attempts to set forth a rule of evidence applicable to a trial in Federal Court, in violation of Section 1, Article 3, of the Constitution, conferring judicial power upon United States courts.

The fifteenth, the same objection except that it attempts to make a measure or rule of damages in Federal courts, contrary to the Constitution.

The sixteenth Assignment, that said law deprives the defendant of property without due process of law, and also deprives it of the equal protection of the laws.

The seventeenth Assignment of Error, in placing the burden of proof upon the defendant in certain cases, is claimed to violate the Fourteenth Amendment by depriving defendants of due process of law and denying to them the equal protection of the laws.

The question of the jurisdiction of the Court was not certified by the trial judge, and all the other questions, as we point out in the brief hereto annexed, have been passed upon either directly or indirectly by the Supreme Court.

BRIEF IN SUPPORT OF MOTION.

I.

Question of Juricdiction.

1. Judicial Code, Section 238, provides as follows:

> "Appeals and writs of error may be taken from the District Courts, including the United States District Court for Hawaii, directly to the Supreme Court in the following cases: In any case in which the jurisdiction of the court is in issue, in which case the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision; * * *"

2. The proper practice is to procure a formal certificate from the court of first instance, stating the question of jurisdiction is in issue.

Maynard vs. Hecht, 151 U. S. 324; 38 L. ed. 179.

Moran vs. Hagerman, 151 U. S. 321; 38 L. ed. 181.

Chappell vs. U. S., 160 U. S. 499; 40 L. ed. 510.

Apapas vs U. S., 233 U. S. 587; 58 L. ed. 1104.

Huntington vs. Laidley, 176 U. S. 667; 44 L. ed. 630, 634.

Anglo-Amer. Pro. Co. vs. Davis Pro. Co., 191 U. S. 376; 48 L. ed. 228.

3. A certificate is not indispensable where there is

a plain declaration in the record that there is a single question of jurisdiction in issue.

Shields vs. Coleman, 157 U. S. 168; 39 L. ed. 660.

Interior C. & I. Co. vs. Gibney, 160 U. S. 217; 40 L. ed. 401.

Smith vs. McKay, 161 U. S. 355; 40 L. ed. 731.

In re Lehigh Mining & Mfg. Co., 156 U. S. 322; 39 L. ed. 438.

Harkrader vs. Wadley, 173 U. S. 148 43 L. ed. 399.

Excelsior Wooden Pipe Co. vs. Pacific Bridge Co., 185 U. S. 282; 46 L. ed. 910.

4. The question of jurisdiction cannot be raised in the Supreme Court where there is no certificate from the trial judge, and where there are other errors assigned in the record.

Fihiol vs. Torney, 194 U. S. 356; 48 L. ed. 1014.

Cosmopolitan Mining Co. vs. Walsh, 193 U. S. 460; 48 L. ed. 749.

5. The certificate must show a final judgment or decree.

McNish vs. Ruff, 141 U. S. 661; 35 L. ed. 893.

Excelsior Wooden Pipe Co. vs. Pacific Bridge Co., 185 U. S. 289; 46 L. ed. 910.

6. The certificate of the trial court must be issued during the term.

Colvin vs. City of Jacksonville, 158 U. S. 456; 39 L. ed. 1053.

The Bayonne, 159 U. S. 687; 40 L. ed. 306.

II.

Direct Appeal in Constitutional Cases.

1. Appeals and writs of error may be taken from the District Courts * * * in any case in which the constitutionality of any law of the United States or the validity or construction of any treaty made under its authority, is drawn in question; and in any case in which the constitution or law of a state is claimed to be in contravention of the Constitution of the United States.

Judicial Code, Section 238.

2. Where the constitutional question has already been decided by the Supreme Court, a direct appeal to such Court is not authorized, because the same question arises in a subsequent case.

Brolan vs. U. S., 236 U. S. 216; 59 L. ed. 544.

Debearne vs. Safety Deposit Co., 233 U. S. 24; 58 L. ed. 833.

Wilson vs. U. S., 232 U. S. 563; 58 L. ed. 728.

Mich. Cent. Ry. Co. vs. Reland, 227 U. S. 59; 57 L. ed. 417.

Fay vs. Crozer, 217 U. S. 455; 54 L. ed. 837.

Kaufman, etc. Co. vs. Smith, 216 U. S. 610; 54 L. ed. 636.

Heitler vs. U. S., 260 U. S. 438; 67 L. ed. 338.

3. A question that has once been decided by the Supreme Court is frivolous.

Brolan vs. U. S. 236 U. S. 216; 59 L. ed. 544.

Heitler vs. U. S., 260 U. S. 438; 67 L. ed. 338.

4. The construction of a state statute does not present a Federal question.

Knop vs. Monongahela Coal Co., 211 U. S. 485; 53 L. ed. 294.

5. Decisions of the Supreme Court upon the constitutionality of the question raised in Assignments of Error hold that statutes similar to the one in question, do not violate the several provisions of the Constitution of the United States alleged in the Assignments of Error and Brief to have been violated.

(a) With respect to the distribution of governmental powers and functions and the judicial powers under the constitution of the United States.

1. A state can properly enact a law and say what constitutes prima facie proof.

Fong Yue Ting vs. U. S., 149 U. S. 698; 37 L. ed. 905.

Bailey vs. State, 211 U. S. 452; 53 L. ed. 278.

2. A law which places the burden of proof on a Chinese laborer without a certificate to show his right of residence in this country, is valid.

Fong Yue Ting vs. U. S., 149 U. S. 698; 37 L. ed. 905.

(b) The statute of Texas in this case does not deprive the defendant of any vested rights under the Constitution.

1. There is no vested right in an existing law.

Chicago, etc., Ry. Co. vs. Transbarger, 238 U. S. 67; 59 L. ed. 1204 (Statute).

Mondou vs. N. Y. etc. Ry. Co., 223 U. S. 1; 56 L. ed. 327.
(Common law).

2. Statutes of a state are valid which add a remedy to an existing right.

Irvine vs. Elliott, 203 Fed. 82.

Fristoe vs. Blum, 92 Tex. 76; 45 S. W. 998.

Ex parte Roper, 61 Tex. Crim. 68; 134 S. W. 334.

3. State statutes are valid which limit the time of the enforcement of a remedy.

Schauble vs. Schulz, 137 Fed. 389.

Campbell vs. Iron-Silver Mining Co., 83 Fed. 643.

DeCordova vs. Galveston, 4 Tex. 470.

4. Remedies for existing rights may be

taken away by state statute without violating the Federal constitution.

Red River Valley Natl. Bank vs. Craig, 181 U. S. 548; 45 L. ed. 994.

Bacchus vs. Fort St. Union Depot Co., 169 U. S. 557; 42 L. ed. 853.

Williams vs. Galveston, 41 Tex. Civ. Ap. 63; 90 S. W. 505.

Watson vs. Boswell, 73 S. W. 985 (Tex.)

(c) The statute of Texas does not deprive the defendants of the equal protection of the laws guaranteed by the constitution of the United States.

1. Generally it is within the power of the states by statute to regulate the admission of evidence and to pass statute making the proof of certain facts prima facie proof of liability.

Luria vs. U. S., 231 U. S. 9; 58 L. ed. 101.

Lindsey vs. Natl' Carbonic Gas Co., 220 U. S. 61; 55 L ed. 369.

M. J. & K. R. R. Co. vs. Turnipseed, 219 U. S. 35; 55 L. ed. 78.

(d) The Texas statute complained of does not deprive the defendants of due process of law guaranteed by the Federal Constitution.

1. State statutes making proof of certain facts prima facie evidence of the existence of another fact, are valid if there is some rational connection between the two.

Adams vs. N. Y., 192 U. S. 585; 48 L. ed. 575.

Meeker vs. Lehigh Valley R. R. Co., 236 U. S. 412; 59 L. ed. 644.

Reitler vs. Harris, 223 U. S. 437; 56 L. ed. 497.

Luria vs. U. S., 231 U. S. 9; 58 L. ed. 101.

Lindsey vs. Natl. Carbonic Gas Co., 220 U. S. 61; 55 L. ed. 369.

M. J. & K. R. R. Co. vs. Turnipseed, 219 U. S. 35; 55 L. ed. 78.

—— vs. ——, 45 Sup. Ct. 490.

U. S. ex rel St. L. S. W. R. R. Co. vs. Interstate C. C., 264 U. S. 64; 68 L. ed. 565.

2. A legislature may change the rules of evidence in civil cases.

Reitler vs. Harris, 223 U. S. 437; 56 L. ed. 497.

3. A state legislature may enact a law regulating the burden of proof.

Minn. Ry. Co. vs. Minn., 193 U. S. 53; 48 L. ed. 614.

4. A legislature may enact a law creating presumptions arising from certain facts.

U. S. vs. Luria, 184 Fed. 643;

Akron C. & Y. R. Co. vs. U. S., 261 U. S. 184; 67 L. ed. 605.

5. The legislature of a state may properly

enact a law providing for punitive damages or penalties.

Coffee vs. Harlan Co., 204 U. S. 659; 51 L. ed. 666.

(providing for double damages in case person is injured by commission of a crime)

Eastman vs. Jennings-McRay Co., 138 Pac. 216 (Ore.)

(providing for double damages for loss by fire caused by negligence of malice).

Mo. Pac. Ry. Co. vs. Ham, 234 U. S. 412; 58 L. ed. 1377.

Mo. Pac. Ry. Co. vs. Kade, 234 U. S. 642; 58 L. ed. 1135.

(providing railroad companies should pay attorney fees in cases involving small amounts).

Hartford Life Ins. Co. vs. Blincoe, 255 U. S. 129; 65 L. ed. 549.

(requiring insurance companies to pay attorney fees in cases where they vexatiously delay or refuse payment).

Missouri R. Co. vs. Humes, 115 U. S. 512; 29 L. ed. 463.

(providing for double damages in case animals injured because of failure of railroad to fence right of way).

6. The constitutional requirement of a hearing (due process) means that a citizen is entitled to orderly proceeding where he has the right and

opportunity to be heard and to defend, protect and enforce his rights.

Amer. Land Co. vs. Zeiss, 219 U. S. 47; 55 L. ed. 97.

Garfield vs. U. S., 211 U. S. 249; 53 L. ed. 168.

Akron, C. & Y. R. Co. vs. U. S., 261 U. S. 184; 67 L. ed. 605.

7. Under this definition a law making a county or municipality liable for the act of a mob in damages resulting from the act of a mob, is valid.

Chicago vs. Sturges, 222 U. S. 313; 56 L. ed. 215.

8. Providing that compensation shall be paid to alien beneficiaries is valid.

Madera Sugar Pine Co. vs. Industrial Com. 262 U. S. 499; 67 L. ed. 1091.

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Attorneys for Defendant-in-Error.

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Of counsel.

NO. [redacted] 40

IN THE

United States Supreme Court

OCTOBER TERM, 1925.

(30,835)

JAMES-DICKINSON FARM MORTGAGE CO.
and A. D. DICKINSON

Plaintiffs-in-Error,

- vs. -

CARRIE M. HARRY,

Defendant-in-Error.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF ILLINOIS.

HONORABLE GEORGE W. ENGLISH, *Judge.*

BRIEF FOR DEFENDANT-IN-ERROR.

WILLIAM M. ACTON,
Attorney for Defendant-in-Error.

WALTER T. GUNN,
Of Counsel.

SUBJECT INDEX

TABLE OF CASES

NO. 259.

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HONORABLE GEORGE W. ENGLISH, *Judge.*

BRIEF FOR DEFENDANT-IN-ERROR.

The Defendant-in-Error has heretofore filed a motion to dismiss, which is still insisted upon, without additional argument.

We believe that the only material issues before this court is the constitutionality of the statute of Texas and

the question of jurisdiction. As pointed out hereafter, a number of the errors relied upon cannot properly be urged in this court. The cause was tried before a jury, and hence Assignment of Error No. 5, alleging no proof of conspiracy (Brief 1), Assignment of Error No. 7, that the damages are excessive (Brief 1), Assignment of Error No. 8, no evidence against the defendant Dickinson (Brief 1), are matters which are conclusively settled by the verdict of the jury. Assignments of Error No. 9 and No. 10 (Brief 2), which assert error on the part of the trial court in charging and refusing to charge the jury, are not subject to review, because no exception was taken in the presence of the jury (Transcript 103). Errors Nos. 11 to 14 inclusive (Brief 2) are general assignments and covered by the special propositions urged and argued.

Defendant-in-error will, therefore, argue the remaining substantial propositions before the court, in their order:

1. As to the validity of service of process upon the corporate defendant, James-Dickinson Farm Mortgage Company.

2. The Texas Statute of Limitations.

3. The constitutionality of the Texas statute.

4. The admissibility of evidence in cases of conspiracy.

5. The right to sue upon the Texas statute in the United States District Court for the Eastern District of Illinois.

We beg to call attention to the case of JAMES-DICKINSON FARM MORTGAGE COMPANY vs. SEIMER, Case No. 428, October term, 1926, United States Supreme Court, in which certiorari was denied. The facts, pleadings and evidence in that case are identical with those in the case of James-Dickinson Farm Mortgage Company vs. Harry, and the same points were raised in the Circuit Court of Appeals.

James-Dickinson Farm Mortgage Co. vs. Seimer, 12 *Fed. 2d.*, 772.

The only distinction between the cases is that the Seimer case was tried before the court and the Harry case tried before a jury.

BRIEF OF ARGUMENT.

I.

VALIDITY OF SERVICE ON CORPORATE DEFENDANT

The plaintiff-in-error by his demurrer to defendant'in-error's replication, admitted sufficient facts to make the service valid. The plea in abatement (Rec. 17) avers that A. D. Dickinson, the officer of the Company upon whom service was had, was not in the State of Illinois upon any business of said corporation (James-Dickinson Farm Mortgage Company), nor as its representative, but on his own private affairs, and that the corporate defendant was not at any time mentioned in said process or in said return, engaged in carrying on business in the state of Illinois.

The replication to this plea denied the allegation thereof by making the following averment: That the said A. D. Dickinson was in Vermilion County, Illinois, upon business of said defendant (James-Dickinson Farm Mortgage Company) and was acting as the agent or representative of said defendant, and was engaged in transacting business for and on behalf of said defendant (James-Dickinson Farm Mortgage Co.) (Rec. 18).

This replication was demurred to and the demurrer overruled, and defendant elected to stand by the same. (Rec. 21) It will be noticed that there is no lack of authority to represent the corporation charged in the plea, and no charge in the plea that the said corporation was not transacting business in Vermilion County *at the time of the ser-*

vice of process. The demurrer of plaintiff-in-error conclusively admits the following:

1. That A. D. Dickinson was in Vermilion County, Illinois, upon business of the defendant, James-Dickinson Farm Mortgage Company.

2. That he was acting as the agent or representative or officer of the James-Dickinson Farm Mortgage Company.

3. That he was engaged in transacting business for and on behalf of the James-Dickinson Farm Mortgage Company.

The demurrer to this replication admitted all the facts actually set forth in the plea, and all facts that could be properly proven under the plea. This case was set down for hearing upon the traverse to the plea in abatement, and the trial fixed for October 4th (Rec. 19). Instead of having a trial upon the issue raised by the plea in abatement and replication thereto, the defendant admitted all the facts in the replication by his demurrer, and thereby enabled the court to consider as true, and as proven not only all the matters alleged in the replication, but all matters which could have been produced upon the trial, properly in support of the allegations contained in the replication.

In *Bissell vs. Spring Valley Township*, 124 U. S. 225, 31 L. ed. 411, it is said:

> "Where the demurrer is to a pleading, setting forth distinctly specific acts touching the merits of the action or defense, and final judgment is rendered thereon, it would be difficult to find any reason in principle why the facts thus admitted should not be considered for all purposes as fully

established as if found by a jury or admitted in open court."

In *Gould on Pleading*, Sec. 43, it is said:

> "A judgment rendered upon demurrer is equally conclusive of the facts confessed by the demurrer as a verdict finding the same facts would have been, since they are established as well in the former case as in the later case by way of record."

The same principle is established in *Dow vs. Applegate*, 152 U. S. 343, 38 L. ed. 469; and *Southern Pacific Ry. Co. vs. U. S.*, 168 U. S. 49, 42 L. ed. 377.

Examining, then, this replication we find that the plaintiff-in-error has admitted that Dickinson was the president of the James-Dickinson Farm Mortgage Company; that said defendant, James-Dickinson Farm Mortgage Company, was served with process within Vermilion County, Illinois, according to law; that Dickinson was at the time of the service of said process in Vermilion County, Illinois, upon business of the James-Dickinson Farm Mortgage Company; that he was acting as agent or representative or officer of the James-Dickinson Farm Mortgage Company; that he was transacting business for and on behalf of the James-Dickinson Farm Mortgage Company. These facts being admitted, we claim the record clearly shows the James-Dickinson Farm Mortgage Company to have been doing business in the Illinois jurisdiction at the time in question.

Plaintiff-in-error complains that the allegation contained in his plea "that this defendant at none of the times mentioned in said process or in said return, was engaged in

or carrying on business in the State of Illinois," was not traversed by the replication. This language in the plea was merely a legal conclusion drawn from the facts alleged in the plea in abatement, with respect to Dickinson's pr ence in the county. Every one of the previous facts charged in the plea set forth to support this legal conclusion, are directly traversed by the replication had and issue to the country tendered. If the case had been tried upon the issue tendered and evidence had been introduced showing that A. D. Dickinson was in the county upon the business of the defendant, James-Dickinson Farm Mortgage Company, and was not here on his own private affairs, and that he was actually transacting business for the defendant, James-Dickson Farm Mortgage Company, then every fact upon which the legal conclusion was drawn in the plea, would have failed of proof, and the plaintiff would have been entitled to judgment upon the merits. We submit that defendant-in-error was just as much entitled to have judgment upon the plea in abatement upon facts admitted by demurrer, as she would have been, had she established the same facts in open court either before a court or jury.

A plea in abatement must be certain to a certain intent in every particular. (Chitty on Pleadings, page). The plea in this case does not charge that the James-Dickinson Farm Mortgage Company was not engaged in business in Vermilion County, Illinois, at the time of the service of the process. The time of the service of the process is the time when the party must be transacting business under the authorities. The time when the process was *issued* or the time when the process was returned, is not the time that controls, as one may be long before the transaction of the business, and the other long after the transaction of the business, which gave the court jurisdiction.

The question of the jurisdiction of the court has been

waived by the general appearance and pleading to the merits by defendant, James-Dickinson Farm Mortgage Co. In B. & O. Ry. Co. vs. Harris, 79 U. S. 65, 20 L. ed. 354, almost the precise state of facts disclosed by this record was before this court. Harris sued the B. & O. Railway Co. in the District Court for the District of Columbia. Defendant filed two pleas in abatement; first, that the Company was not an inhabitant of the District when the writ was served; second, that the Company was not found in the District when the writ was served. To the first plea, replication was filed that the Company was an inhabitant of the District by virtue of certain acts of Congress; to the second plea in abatement, replication was filed that the defendant was found within the District. The defendant demurred to both replications. The demurrers were overruled, and the railroad company thereupon filed a plea of not guilty. It was held that the error was waived by pleading over in bar. Authorities to substantially the same effect are *Stanton vs. Embrey*, 93 U. S. 548; 23 L. ed. 983; *Sheppard vs. Duncan*, 55 U. S. 512, 14 L. ed. 521; *Pollock vs. Mayer Bros.*, 233 Fed. 861; *Bangor Furnace Co. vs. Magill*, 108 Ill. 656; *Lindsey vs. Stewart*, 59 Ill. 491.

This court has in a great number of instances sustained jurisdiction upon facts less comprehensive than those facts admitted by the plaintiff-in-error in and by his demurrer, illustrations of which are given as follows:

An Indiana insurance company was sued in Ohio, Circuit Court of the United States, upon service obtained upon an agent selling insurance in Ohio. The court holds:

> "When this corporation sent its agent into Ohio with authority to make contracts of insurance there, the same must be taken to assent to the condition upon which alone such business

could be transacted there by them; that condition being that an agent to make contracts should also be an agent of the corporation to receive service of process in suits on such contracts, and in legal contemplation the appointment of such agent clothed him with power to receive notice for and on behalf of the corporation as effectually as if he were designated in the charter as the officer on whom process should be served. The process was served within the limits and jurisdiction of Ohio, upon a person clothed by law to represent the corporation there in respect to such service."

Lafayette Ins. Co. vs. French, 60 U. S. 404, 15 L. ed. 451.

In an action for damages alleged to have been sustained in consequence of an assault upon the plaintiff, a passenger upon the defendant's steamship, while plaintiff was a passenger, by a person for whose act it is alleged the defendant was responsible. The assault took place in a port in Ireland. The plaintiff was a citizen and resident of the State of New Jersey; the defendant corporation, incorporated under the laws of Great Britain. It was a common carrier operating a line of steamships. It did business in the State of New York through the firm of Henderson Brothers, its agents, and had property therein. There was no proof of any written designation by the defendant of any one within the State of New York upon whom service of process might be made. Service was made upon a member of the firm of Henderson Brothers, as agent for the defendant. Jurisdiction was sustained.

Barrow Steamship Co. vs. Kane, 170 U. S. 100; 42 L. ed. 964.

Action upon a life insurance policy. The policy was issued upon the life of a citizen and resident of Tennessee. The Company was a Connecticut corporation. After his death suit was started in Tennessee. The corporation did a life insurance business in Tennessee from 1870 to 1894. The Company maintained an agent in the state upon whom service could be had, until 1894. After 1894 it withdrew its agent for process. The policy was issued before 1894. The suit was brought after 1894. Process was served upon the adjuster of the corporation sent in to the state to adjust and pay the loss. Jurisdiction was sustained.

Conn. Mut. Ins. Co. vs. Spratley, 172 U. S. 602; 43 L. ed. 569.

The Mutual Reserve Life Association designated the Insurance Commissioner of Kentucky to receive service of process in any action brought in Kentucky against it. In October, 1899, the insurance commissioner cancelled the license which had been issued to the Association and revoked all authority for the insurance company to do business in Kentucky. After that date the insurance company had no agents in the State of Kentucky, and did no new business whatever in the State, but at one time, for convenience, permitted the holders of policies to remit dues and assessments through a bank located in Louisville. In February, 1920, Phelps commenced an action in the Circuit Court of Jefferson County, Kentucky, against the Association, alleging certain money was due him by breach of a policy with the Company. Summons was issued and served on the insurance commissioner Defendant appeared specially and moved to quash service. Motion overruled. Later an action was brought in the United States court to enjoin

collection of the judgment. The Supreme Court upheld the service of process.

Mutual Reserve Life Ins. Co. vs. Phelps, 190 U. S. 147; 47 L. ed. 987.

A foreign insurance company is doing business within the state so far as the question of the power of the Federal Court sitting in that state, to obtain jurisdiction over such corporation, is concerned, where under the terms of its policies covering property in that state it sends its agents there to adjust losses.

Pa. Lumbermen's Mutual Fire Ins. Co. vs. Mayer, 197 U. S. 407; 49 L. ed. 810.

Suit was commenced by Mary Davis in the Circuit Court of Howard County, Missouri, against Connecticut Mutual Accident Co. and removed to the Circuit Court of the United States. The husband of the plaintiff held a policy in the Company, issued in August, 1896, for $5,000.00, insuring against accidental death. He died in January, 1907, from accident in December, 1906. A doctor in Howard County was authorized to examine the body of the deceased and to adjust the claim. The Company was sued, and process served upon this doctor. The state laws authorized service to be made upon any agent or employe of a foreign corporation in the county. Jurisdiction was sustained by the Supreme Court.

Conn. Mut. Accident Co. vs. Davis, 213 U. S. 245; 53 L. ed. 712.

Alexander brought his action in the Supreme Court of

New York against the St. Louis Southwestern Railway Company, a Texas corporation, to recover damages for loss sustained arising out of negligence in failing to properly ice certain cars shipped from Texas to New York. Service of process was had upon a director residing in New York. Cause removed to the Federal Court, and motion to quash summons because the railroad company is a foreign corporation and not doing business within the state of New York, and was not found within the state, and had not voluntarily appeared. The process in the state court was in accordance with the New York statute. The bill of lading called for delivery of goods in New York. There was an office in New York upon which appeared the sign "Cotton Belt Route," which was also found upon the stationery of the defendant. Jurisdiction was sustained.

St. Louis S. W. Ry. Co. vs. Alexander, 227 U. S. 218; 57 L. ed. 486.

The solicitation of orders through local agents of a non-resident manufacturing corporation, which were sent to another state to be filled, all articles ordered being delivered within the state and the agents having authority to receive payments in money, check or draft, and to take notes payable at banks in the state, amounts to doing business in the state to the extent that will authorize the service of process upon its agents thus engaged.

International Harvester Co. vs. Kentucky, 234 U. S. 579; 58 L. ed. 1479.

A foreign insurance company which has filed with the Superintendent of Insurance of Missouri a power of attorney consenting that service of process upon that official

should be deemed personal service so long as the Company had any liability outstanding in the state, is not denied the due process of law because the consent is construed to render the service valid in causes of action *arising in other* states.

Pa. Fire Ins. Co. vs. Gold Issue Mining & Milling Co., 243 U. S. 93; 61 L. ed. 610.

The facts thus held in the above cases to confer jurisdiction are in many cases similar, and in other cases far short of the facts, admitted by plaintiff-in-error's demurrer, and under said authorities the admitted facts befor this court clearly show that the defendant, James-Dickinson Farm Mortgage Company, was doing business in Vermilion County, Illinois.

The case of *Munster vs. Weil Corset Co.*, 261 U. S. 276, 67 L. ed. 652, cited by plaintiff-in-error, has no application. There, a suit was brought in Connecticut, and process was served by *sending it to New York* where it was served. The defendant at no time was in the state of Connecticut. Of course, such a service would be void. In the present case before the court, however, Dickinson himself was personally present in the District and, as pointed out above, his Company, the James-Dickinson Farm Mortgage Company, was in the District transacting business.

The *Rosenberg* case, 260 U. S. 516, 67 L. ed. 372, goes no further, we believe, than to hold that under the special facts there determined by the court, that the service was invalid. We fail to see anything in the two principal cases cited by plaintiff-in-error that is inconsistent with or overrules the authorities above cited by defendant-in-error.

The plea in abatement is fatally defective in substance. The allegation "that this defendant, at none of the times mentioned is said process or in said return, was engaged in or carrying on business in the state of Illinois," is but a statement of a conclusion of law. A similar allegation in the following language, viz: "that said defendant is a municipal corporation organized and existing under and by virtue of the laws of the state of Indiana, with full power and authority, pursuant to the laws of said state, to execute negotiable paper," was held to be but a statement of a conclusion of law.

> *Hooper vs. Town of Covington*, 118 *U. S.* 148, 30 *L. ed.* 190.

The court comments in the following language, page 151:

> "The declaration is fatally defective for not stating facts necessary to enable the court to judge for itself whether the conclusion of law has any foundation of facts,"

and cites several cases to support the holding.

We offer this suggestion to the court, in addition to those already suggested in brief of Defendant-in-error.

II.

STATUTE OF LIMITATIONS

Under the Texas decisions the statute of limitations does not commence to run in fraud and deceit cases until two years after the discovery of the fraud and deceit. The fraud was perpetrated in February, 1920 (Rec. 36). Mrs. Harry did not discover the fraud until August, 1922 (Rec. 40). The suit was started in the Circuit Court of Vermilion County on the 29th day of January, 1923. Thus five months elapsed between the time of the discovery of the fraud and the bringing of the action.

The uniform holdings of the State of Texas are to the effect that the statute of limitations in fraud cases does not commence to run until the fraud is discovered, and after the fraud is discovered it takes two years to bring the bar of the statute into effect.

Panding vs. Perkins, 29 Tex. 348.

Ripley vs. Withee, 27 Tex. 14.

Howell vs. Bank, 158 S. W. 574 (Tex.)

Young vs. Bonneraft, 168 S. W. 392 (Tex.)

Powell vs. March, 159 S. W. 936 (Tex.)

White vs. Love, 174 S. W. 913 (Tex.)

Stone vs. Burns, 200 S. W. 1121 (Tex.)

Bayne vs. Lovejoy, 215 S. W. 984.

The corporate defendant, James-Dickinson Farm Mortgage Company, is a corporation organized under the laws of the State of Missouri (Rec. 63) (Plaintiff's Ex. 1, page 35). The Texas statute with reference to such corporations is as follows:

> "If any person against whom there shall be a cause of action shall be without the limits of this state at the time of the accruing of such action, or at any time during which the same might have been maintained, the persons entitled to such action after his return to the State and the time of such person's absence, shall not be accounted or taken as a part of the time limited by any of the provisions of this article."
>
> Act of Feb. 5, 1841. Art. 5702, 1920 Texas Statutes.

Under such a statute it has been held that the corporate defendant, James-Dickinson Farm Mortgage Company, was absent within the meaning thereof, and as long as such corporation was absent from the State of Texas, the statute did not commence to run.

Wood on Limitations, Sec. 250.

Rathbun vs. Northern Cent. Ry. Co., 50 N. Y. 656.

Winnie vs. Sandwich Mfg. Co., 86 Ia. 608, 53 N. W. 421.

III.

THE STATUTE OF TEXAS DOES NOT VIOLATE THE CONSTITUTION OF THE UNITED STATES

The provisions of this statute appear in both the transcript (page 12), and brief of plaintiff-in-error (page 42).

Section 1 defines actionable fraud with reference to transactions in real estate or stock in corporations or joint stock companies, to consist in either a false representation of a past or existing fact or a false promise to do some act in the future which is made as a material inducement to another party to enter into a contract but for which the party would not have entered into.

Section 1 also provides that whenever a promise has not been complied with within a reasonable time it shall be presumed to have been falsely and fraudulently made, and throws the burden on the party making it to show it was made in good faith.

Section 2 provides that all persons guilty of fraud, *as defined by this Act*, shall be liable in damages.

Section 2 provides that the measure of damages shall be the difference in the value of property as represented and its actual value at the time of the fraud.

Section 3 provides that all persons making the false representations and all persons deriving benefit of the fraud, shall be jointly liable in actual damages.

Also, that persons knowingly and wilfully making false representations or knowingly taking advantage of the fraud,

shall be liable in exemplary damages not exceeding double the amount of the actual damages.

The particular section of the statute claimed to be unconstitutional is that part of Section 3 placing liability upon all persons deriving benefit of said fraud, and the provision of the statute creating a presumption of fraud in case the false promises are not complied with within a reasonable time.

Counsel for plaintiff-in-error treat the provision, "and all persons deriving the benefit of said fraud," as though it were an independent enactment not connected in any way with the balance of the statute.

These words, however, must be construed in connection with Section 2 of the Act providing as follows:

> "All persons guilty of fraud, as defined in this act, shall be liable to the person defrauded, for all actual damages suffered."

The connection between these two sections makes it apparent that persons deriving the benefit of the fraud must be guilty of fraud, as defined in the Act, and thus construing these two sections of the statute together the law places a liability both upon the perpetrator and the beneficiary who has committed a fraud, as defined by the statute.

This statute is not nearly so broad as a statute of the State of Illinois. It renders void in the hands of an innocent party a promissory note given in a gambling transaction, and laws of the last mentioned kind have been upheld

in practically all jurisdictions as violating no constitutional provision.

Ill. Statute Chap. 38, Sec. 131.

Pope vs. Henke, 155 Ill. 617.

Porter vs. First National Bank, 212 Ill. App. 250.

So, also, laws which render a promissory note invalid where the signature is procured by fraud, in the hands of an innocent third party, have been upheld.

Ill. Statute, Chap. 98, Sec. 10.

Connolly vs. Dammann, 232 Ill. 175.

Martina vs. Muhlke, 186 Ill. 327.

In the classifications just above specified, the courts have upheld statutes where the innocent party has first invested his money and is unable to collect on the obligation. The identical principle applies here, except that the so-called innocent party receives the money first and then is compelled to pay it back. The positions are identical with respect to the financial liability.

There is a further distinction to be observed, and that is, that under the law with reference to negotiable instruments, where the note passes from hand to hand to bona fide purchasers, that this element of good faith in the purchaser would seem to raise stronger equities in his favor than the acts of transactions in land, of so doubtful a character, that the legislature of Texas was compelled to enact a statute to protect persons dealing in Texas land.

The fourth clause of the statute, placing upon the public records the declaration that there was then existing in the State of Texas a number of fraudulent land schemes defrauding citizens by false representatoins, would certainly afford sufficient notice for such persons to make some inquiry into Texas land transactions before advancing money to finance them.

There is another rule that would certainly apply, at least with respect to mortgages given upon lands, tainted with the fraud prohibited by the Texas statute with reference to the right of the mortgagor to defend against the purchaser of a paper secured by the mortgage.

The general set rule is that any defense that could be made by the mortgagor against the mortgagee upon the foreclosure of the mortgage can be made against the purchaser of the note and mortgage.

Hazel vs. Boudy, 173 Ill. 302.

Buehler vs. McCormick, 169 Ill. 269.

Walker vs. Thompson, 108 Mich. 686.

Tate vs. Security Trust Co., 63 N. J. Eq. 379.

Hill vs. Hoole, 116 N. Y. 299.

Wilson vs. Ott, 173 Pa. St. 253.

There can be no objection under the constitution, we believe, in enacting by statute a law for the prevention of fraud that is no more severe in its application than long-established doctrines of equity with respect to mortgages.

Counsel cite *Riverside Mills vs. Menefee*, 237 U. S. 189, 59 L. ed. 910, as authority for the invalidity of the Texas statute in question. This decision does not pass upon any statute, but was written solely with reference to a question of jurisdiction over the person of one not within the limits of the state where he is sued.

The application of certain language in the decision is that to condemn a person without a hearing is repugnant to the due process of law clause of the Constitution.

The Texas statute does not take away from citizens any right to be heard or to defend or to protect their rights. The due process guaranteed by the Constitution means that a citizen is entitled to an orderly proceeding where he has the right and opportunity to be heard and to defend, protect and enforce his rights.

American Land Co. vs. Zeiss, 219 U. S. 47, 55 L. ed. 97.

Garfield vs. U. S., 211 U. S. 249, 53 L. ed. 168.

Akron C. & Y. Ry. Co. vs. U. S., 261 U. S. 184, 67 L. ed. 605.

An example of a case in which it was held that due process of law was not denied, in other words, that a party was tried without a hearing, is *Chicago vs. Sturges*, 225 U. S. 313, 56 L. ed. 215, wherein a law making a county or municipality liable for the act of a mob, is held constitutional.

It is inferentially argued by plaintiff-in-error that the provisions in the Texas statute creating a presumption of

fraud under certain conditions and throwing the burden of proof upon the person making the false representations, under certain conditions, are in violation of the provisions of the Constitution.

The Assignments of Error , 14, 15, 16 and 17: These several assignments raise the question that the Texas statute deprives the plaintiff-in-error of property without due process of law; that they violate Section 1, Article 3, of the Federal Constitution, conferring judicial power upon the United States courts; and that they deprive plaintiff-in-error of the equal protection of the laws.

All these several objections have been determined adversely to plaintiff-in-error in similar cases, or cases in which the principle is analogous.

(a)

With respect to the distribution of governmental powers and functions and the judicial powers under the Constitution of the United States.

A state can properly enact a law and say what constitutes prima facie proof.

Bailey vs. State, 211 U. S. 452; 53 L. ed. 278.

Fong Yue Ting vs. U. S., 149 U. S. 698, 37 L. ed. 905.

(b)

The Texas statute in this case does not deprive the

plaintiff-in-error of any vested rights under the Constitution.

There is no vested right in an existing statute law.

Chicago, etc. Ry. Co. vs. Transbarger, 238 U. S. 67; 59 L. ed. 1204.

There is no vested right in an existing principle of the common law.

Mondou vs. N. Y. etc. Ry. Co., 223 U. S. 1, 56 L. ed. 327.

Statutes of a state are valid which add a remedy to an existing right.

Irvin vs. Elliott, 203 Fed. 82.

Fristoe vs. Blum, 92 Tex. 76, 45 S. W. 998.

Ex parte Roper, 61 Tex. Crim. 68, 134 S. W. 334.

Remedies for existing rights may be taken away by state statute without violating the Federal constitution.

Red River Valley Natl. Bk. vs. Craig, 181 U. S. 548, 45 L. ed. 994.

Bacchus vs. Fort St. Union Depot, 169 U. S. 557, 42 L. ed. 853.

(c)

The Texas statute does not deprive the plaintiff-in-

error of the equal protection of the laws guaranteed by the Constitution of the United States.

Generally it is within the power of the states by statute to regulate the admission of evidence and to pass statutes making the proof of certain facts prima facie proof of liability.

Luria vs. U. S., 231 U. S. 9, 58 L. ed. 101.

Lindsey vs. Natl. Carbonic Gas Co., 220 U. S. 61, 55 L. ed. 369.

M. J. & K. R. R. Co. vs. Turnipseed, 219 U. S. 35, 55 L. ed. 78.

(d)

The Texas statute does not deprive plaintiff-in-error of due process of law guaranteed by the Federal Constitution.

State statutes making the proof of certain facts prima facie evidence of the existence of another fact are valid if there is some rational connection between the two.

Adams vs. N. Y., 192 U. S. 585, 48 L. ed. 575.

Meeker vs. Lehigh Valley R. R. Co., 236 U. S. 412, 59 L. ed. 644.

Reitler vs. Harris, 233 U. S. 437, 56 L. ed. 497.

Luria vs. U. S., 231 U. S. 9, 58 L. ed. 101.

Lindsey vs. Natl. Carbonic Gas Co., 220 U. S. 61, 55 L. ed. 369.

U. S. ex rel vs. Interstate Com. Com., 264 U. S. 64, 68 L. ed. 565.

A legislature may change the rules of evidence in civil cases.

Reitler vs. Harris, 223 U. S. 437, 56 L. ed. 497.

A state legislature may enact a law regulating the burden of proof.

Minnesota Ry. Co. vs. Minn., 193 U. S. 53, 48 L. ed. 614.

A legislature may enact laws creating presumptions arising from certain facts.

Akron C. & Y. Ry. Co. vs. U. S., 261 U. S. 184, 67 L. ed. 605.

A legislature of a state may properly enact a law providing for punitive damages or penalties.

Coffey vs. Harmon, 204 U. S. 659, 51 L. ed. 666.

In the above case the statute provided for double damages to a person injured by one while in the commission of a crime.

Mo. Pac. Ry. Co. vs. Hamm, 234 U. S. 412, 58 L. ed. 1377.

Mo. Pac. Ry Co. vs. Kade, 234 U. S. 642, 58 L. ed. 1135.

In the last two cases the statute provided railroad companies should pay attorney fees in cases involving small amounts.

Hartford Life Ins. Co. vs. Blinco, 255 U. S. 129, 65 L. ed. 549.

The law in the above case required insurance companies to pay attorney fees in cases where they vexatiously delayed or refused payment.

IV.

CONSPIRACY

The evidence in the record shows that Dickinson and his associate, James, completely dominated the corporate defendant (Rec. 63). They owned ninety per cent, of the capital stock of the Lone Star Immigration Company, the James-Dickinson Farm Mortgage Company of Missouri, and the James-Dickinson Farm Mortgage Company of Texas, and the same persons were the officers of the same companies. In other words, it was so arranged by stock control that the corporations were the mere agents of the owners. The defendant, A. D. Dickinson, and the corporation were charged as conspirators to effect the fraud charged in this case.

Where the fraudulent intent of a party and the performance of an act is in issue, proof of other fraudulent acts is relevant and admissible to establish his intent or motive in the performance of the act in question. When it appears that there is such a connection between the other acts and the act in question as to furnish the inference that

both are a part of one scheme or plan in which the same motive is operated.

Jack vs. Life Insurance Co., 113 Fed. 39.

U. S. vs. Kenney, 90 Fed. 257.

N. Y. Mut. Life Ins. Co. vs. Armstrong, 117 U. S. 591.

Butler vs. Wilkins, 13 Wall. 456.

Lockwood vs. Doan, 107 Ill. 235.

Rebe vs. Frank, 12 Tex. App. 125, 34 S. W. 777.

Brown vs. Greenfield Life Ins. Co., 172 Mass. 498, 53 N. E. 55.

It is immaterial whether such other fraudulent acts occurred before or after the act in question, as remoteness in point of time affects only their weight.

Mudsill vs. Watson, 61 Fed. 163.

Pa. Ins. Co. vs. Mechanic's Sav. Bk., 72 Fed. 413.

Horton vs. Winer, 124 Mass. 92.

Where a person is president of both a land company and a farm mortgage company, and the companies have offices in common, and the names are used interchangeably, such facts are sufficient to sustain a verdict against both

companies, where the other elements of the case are made out.

Norton vs. Stewart Land Co., 228 S. W. 838 (Tex.)

V.

THE FEDERAL COURT FOR THE EASTERN DISTRICT OF ILLINOIS HAD AUTHORITY TO ENFORCE LIABILITY UNDER THE TEXAS STATUTE.

It is well settled that a statute giving punitive damages by way of a remedy, is a remedial statute and can be enforced in a Federal Court sitting outside of the state wherein the law is enacted.

Huntington vs. Attrill, 146 U. S. 657, 36 L. ed. 1123.

Stewart vs. B. & O. R. R. Co., 168 U. S. 499, 42 L. ed. 539.

Texas & Pac. Ry Co. vs. Cox, 145 U. S. 593, 36 L. ed. 829.

O'Sullivan vs. Felix, 233 U. S. 318, 58 L. ed. 980.

Gaston vs. Western Union Tel. Co., 266 Fed. 595.

The case of *Huntington vs Attrill, supra*, is a clear example of the principle. A statute of New York made the officers of a corporation who signed a false certificate of the amount of its capital stock liable for all of its debts. Attrill had signed such a record, which was false, and Huntington obtained a judgment against him in New York for $100,000. Huntington then sued Attrill in Maryland upon

the judgment. The point was raised that the New York statute was a penal statute, and could not be enforced in Maryland, and the Supreme Court of Maryland so held, but the Supreme Court of the United States reversed the decree, holding that the New York statute was enforceable in the State of Maryland.

In *O'Sullivan vs. Felix, supra*, it is held that $10,000 claimed as punitive damages was not a penalty under Federal law, but claimed as civil redress. Quoting from *Huntington vs. Attrill, supra*, it is said:

> "It has been held in many cases that where a statute gives cumulative damages to the party grieved, it is not a penal action. * * * Thus, a statute giving to a tenant's suit without notice double the yearly value of the premises, against the landlord, has been held not like a Federal law where the punishment is imposed for a crime, but rather as a remedial. The law because of the act and deed does give a penalty, but it is to the party grieved."

Counsel for plaintiff-in-error on page 64 cite a number of authorities. It will be noticed that they are based upon the proposition where the action is in tort and is *not of common law origin*. (See page 63). It is, of course, elementary that actions for fraud and deceit are strictly of common law origin, thus rendering all the citations beside the point. The real objection is taken to the punitive damages which, as above pointed out under Subdivision 3, is no objection to their being constitutional and no bar to their being sued upon in any Federal court in the United States.

VI

CHARGES GIVEN TO THE JURY

Plaintiff-in-error did not save for review any objection or exception to the court's charge to the jury. On page 103 of the record appears the following:

> "And thereafter Mr. Rearick, on behalf of the defendants *and out of the presence of the jury*, made the following exceptions and suggestions."

It is well settled that exceptions to the court's charge to the jury must be made in the presence of the jury and before the jury retires, before any action of the court thereon can be assigned as error.

Phelps vs. Mayer, 15 How. 160, 14 L. ed. 643.

Rumely vs. U. S., 293 Fed. 532.

Joyce vs. U. S., 294 Fed. 665.

Star Co. vs. Madden, 188 Fed. 910.

3 *Foster Fed. Prac.*, 2428 (6 ed.)

CONCLUSION

We believe that the plaintiff-in-error has failed to establish that any constitutional or jurisdictional question authorizing direct appeal to the Supreme Court, is involved in this case. Certainly no jurisdictional feature can properly come before the court, as there was no certificate of this question signed by the trial court. If these features

are out of the case, there is nothing left for the court to review, except questions of evidence, and of the trial court's charges which, of course, cannot be brought here on direct appeal or writ of error. We respectfully pray that the judgment of the District Court of the United States for the Eastern District of Illinois be affirmed.

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